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# **Deaf citizens as jurors in Australian courts: Participating via professional interpreters**

## **Abstract**

Australian deaf citizens are currently not permitted to perform jury duty, primarily due to their inability to hear the evidence and deliberate without interpreters. Although interpreters are routinely employed to interpret for defendants or witnesses in court, current legal frameworks do not permit interpreters to enter the deliberation room as a 'thirteenth person', for fear that they may influence the jurors or become active participants in the decision-making. Other objections to allowing deaf citizens to act as jurors include uncertainty about their ability to participate fully in the discussions, the impact the deaf juror's and interpreter's presence may have on the dynamics of the deliberations and on **turn-taking**, and the logistics and cost involved. Yet, deaf citizens see it as their right to be able to perform this very important civic duty, and recent decisions at the international level indicate that excluding deaf citizens from jury duty should be considered unlawful discrimination. This paper presents results from the analysis of the jury deliberations with one deaf juror and two Auslan<sup>1</sup> interpreters, and from a focus group discussion with the eleven hearing jurors and an interview with the deaf juror about their experience. The jury deliberation is one section of a large-scale study on the participation of deaf jurors in a criminal trial with Auslan interpreters, in New South Wales.

**Key words:** Deaf jurors, Auslan interpreters, civil rights, jury deliberations, interpreters' Code of Ethics.

## **1. Introduction**

The study discussed in this article builds on previous research, which focused primarily on deaf juror comprehension of jury instructions (Napier & Spencer, 2008; 2017), to consider more broadly issues arising from the participation of deaf citizens in the trial process, including the impacts of having a deaf juror participate in jury deliberations. A key component of this study was the running of a full length mock trial, at a New South Wales District Court, in Parramatta, and the monitoring and analysis of not only the courtroom interaction but also the jury deliberations.

To set the context of the study, the paper will outline the legislative and operational framework governing jury selection in two selected jurisdictions in Australia, as well as some of the regular objections to the inclusion of deaf citizens on juries relevant to those jurisdictions.

The study was funded by the Australian Research Council under its Linkage projects scheme with the aim to assess the feasibility of deaf people acting as jurors in Australian trials. The project obtained Ethics approval from the University of New South Wales Research Human Ethics Committee.<sup>2</sup>

### ***1.1 A contemporary issue***

The participation of deaf citizens as jurors in criminal trials has come to the fore recently in Australia following the handing down of decisions in two high profile challenges to the exclusion of deaf citizens from jury service in two state jurisdictions, Queensland and New South Wales. In April of 2016 the Committee on the Rights of Persons with Disabilities found that not providing for the inclusion of two deaf citizens in NSW in a jury pool amounted to a failure on the part of Australia to fulfil its obligations under the Convention on the Rights of Persons with Disabilities.<sup>3</sup> In October 2016, the High Court of Australia handed down its decision addressing a challenge brought to the operation of the *Jury Act 1995* (Queensland) by Ms Gaye Lyons, who had been summoned for jury duty. When summoned, Lyons informed the Sheriff's Office that she would require the assistance of an Auslan interpreter to participate on the jury if she were selected. After some correspondence, a decision was made to exclude her from the jury pool. Lyons challenged this decision under the *Anti-Discrimination Act 1991* (Queensland).

Lyons argued that her exclusion was by reason of her disability, and that this amounted to prohibited discrimination (*Lyons v State of Queensland* [2015] QCA 159 (28 August 2015); *Lyons v State of Queensland* [2014] QCATA 302 (21 October 2014); *Lyons v State of Queensland (No 2)* [2013] QCAT 731). Lyons' appeal to the Queensland Court of Appeal was unsuccessful, as was her subsequent appeal to the High Court (*Lyons v Queensland* [2016] HCA 38 (5 October 2016)).

### ***1.2 Legislative barriers***

As our study is set in the state of New South Wales (NSW), we will provide an overview of the legislative framework in this state, where jury selection and management is administered by the Sheriff's Office, and governed by the *Jury Act 1977* (NSW) (the Act). The Act provides a list of those who are presumptively excluded from service, including those who have been convicted of certain criminal offences, or are in some way implicated in the administration of justice to such an extent that it precludes their participation on a jury. Into this category would fall judicial officers, serving police officers, Australian lawyers, as well as those engaged in the delivery of legal services in criminal cases, for example through their employment by the Director of Public Prosecutions or NSW Legal Aid Commission (see Schedule 1 *Jury Act 1977* NSW). The Act also allows certain professions and carers the right to claim an exemption (see Schedule 2).

Beyond these categories, ss 14(2) and (3) of the NSW Act allows others to claim an exemption, either permanently or for a period, on the basis of hardship, potential conflict of interest, or because they are, by reason of a disability, unable to perform their function as a juror. Significantly, under s 14(4):

The sheriff may exempt a person from jury service whether or not on the request of the person if the sheriff is of the opinion that there is good cause for the exemption.

Section 14A of the Act then offers further guidance as to what might constitute, 'good cause' to be excused from jury service, and relevantly provides that a potential juror can be exempted by the sheriff if:

- (a) jury service would cause undue hardship or serious inconvenience to the person, the person's family or the public, or
- (b) some disability associated with that person would render him or her, without reasonable accommodation, unsuitable for or incapable of effectively serving as a juror, or
- (c) a conflict of interest or some other knowledge, acquaintance or friendship exists that may result in the perception of a lack of impartiality in the juror, or
- (d) there is some other reason that would affect the person's ability to perform the functions of a juror.

Two recent challenges to the operation of the New South Wales legislation, brought under the Federal *Disability Discrimination Act 1992* (Commonwealth), focused on the application of s 14(4) and the refusal of the sheriff to provide the potential jurors with access to an Auslan interpreter or a closed caption stenographer. In both cases the sheriff had based their decision on the fact that the legislation prohibited the presence of a thirteenth person in the jury room and that (thus) it was not possible to make the accommodations requested.

Approaching the same issue slightly differently, in Queensland, where the Lyons case took place, section 4 of the *Jury Act 1995* (Queensland) lists those who are *ineligible* for jury service, including those who are ineligible by virtue of their profession, and includes in this section those with a disability:

s 4 (1) a person who has a physical or mental disability that makes the person incapable of effectively performing the functions of a juror;

The primary reason cited for the *ineligibility* of the deaf juror by the Tribunal in the Lyons case, developed further in the later cases, was that the juror would be incapable of effectively performing the functions of a juror, because she would require an Auslan interpreter not only in the courtroom, but, critically, also in the deliberation room. That a deaf juror would be unable to participate in deliberations independently meant that she was unable to discharge her function as a juror.<sup>4</sup> The presence of an interpreter during the deliberation process necessarily introduced a 'thirteenth person' into the jury room, and it was this, rather than her disability, that rendered her ineligible for jury service. Auslan interpreters work in pairs, so in the case of deaf jurors, it would be a 'thirteenth' and 'fourteenth' persons (see Napier, Spencer & Sabolcec, 2007 & 2009, for a review of the limited Australian jurisprudence on this, and related issues). It seems to have been assumed by the decision maker(s) in the Queensland cases that the common law prevented the presence (and participation) of a 'stranger' during deliberations. Douglas J, in *Re: the Jury Act 1995* [2014] QSC 113, at [6] goes so far as to refer to an interpreter as a '13<sup>th</sup> juror'. That this is the common law position in Australia was confirmed by the High Court in its decision in the Lyons case. Equally significant, the courts also pointed to the obligations of confidentiality contained in s 54 of the *Jury Act 1995* (Qld), and noted that no such obligation could be imposed on the interpreter under that legislation in its current form. In the absence of express legislative provisions addressing the situation, the various decision makers, including those considering Lyons' challenge were

unwilling to authorise the presence of an interpreter in the jury room as a means of enabling her to perform her jury service.

Arguably the approach that is facilitated by the current legislation in most Australian jurisdictions is one that proceeds from the expectation that the problem that needs to be controlled, or managed, is applications from those seeking to be excused or exempted from jury service. Thus to some extent these legislative structures, coupled with the decision-making experience and expectations of those involved in jury selection and management, has shaped the responses to situations where a deaf citizen has sought to remain in the jury pool and remain eligible for selection. It is worth noting that in New South Wales, the inclusion in section 14A(b) of the phrase, “without reasonable accommodation” points to the need for both the applicant and the Sheriff’s Office to consider what might constitute reasonable accommodation (the language of anti-discrimination law) such as to enable a person with a disability to participate in jury service. By way of comparison, a person who used a wheelchair can be (reasonably) accommodated in many contemporary courtrooms, though in practice, it is likely that a person with a disability seeking exemption would be excused. What seems clear is that the decision-makers are unaccustomed to responding to a potential juror who does not seek exemption, but instead presents with the expectation that the courts will enable their participation by way of reasonable accommodations that extend beyond the relatively simple environmental adjustments necessary, for example, to accommodate a wheelchair.

The experience in Queensland can be compared with Western Australia and overseas where deaf citizens do not seem presumptively to be considered either excused (or seeking exemption) or excluded from jury service. In 2014 a deaf citizen was summoned for jury duty in Western Australia and attended the relevant courthouse with an Auslan interpreter. The potential deaf juror was not selected in the ballot to sit on the jury, but importantly the potential jury member was permitted to remain in the jury pool (Napier & McEwin, 2015). Critically, deaf citizens have also been able to serve as jurors in a number of overseas jurisdictions including New Zealand and some courts in the United States since 1979 (Napier, Spencer & Sabolcec, 2007; Napier & McEwin, 2015).

Despite the exemplars in Western Australia, New Zealand and the US, the influence of the decision in *Lyons* will be felt in other states and territories in Australia, where they have yet to test the eligibility of a deaf person to discharge the role of juror, though the issue has been raised in the second major jurisdiction, Victoria (Varnham O’Regan, 2014). However, the outcome of the appeal in *Lyons*, in particular the findings in relation to perceived omissions in the *Jury Act 1995* (Qld), indicate that a specific legislative amendment will be needed in that jurisdiction in order to permit the presence of an interpreter during jury deliberations. Further, an accompanying shift in policy and approach will be needed to encourage courts and court administrators to allow deaf (and blind) citizens to remain in the jury pool and, potentially, serve as jurors.

### ***1.3 Other objections to the inclusion of deaf citizens on juries in Australia***

Going beyond the specific legislative and legal limitations discussed above, justifications for excluding deaf citizens to participate on a jury can be loosely grouped into two categories. The first relates to concerns that focus on practical and administrative or resourcing implications. These are real issues, but ones that cannot be addressed directly via this study. The second category includes objections that express more substantive concerns, and that are grounded (for the most part) in an attentiveness towards possible implications for defendants, and the obligations of courts to ensure a fair trial (see generally Hunter et al, 2015). These concerns are linked in some respects to the emphasis on the protection of the secrecy of jury deliberations.

An attention to the obligation to provide a fair trial gives rise to questions relating to deaf juror comprehension (Napier & Spencer, 2007, 2017), the quality of interpretation and translatability of legal concepts from spoken to signed language (Napier & Spencer, 2008), interpreter role and responsibilities (Napier & Banna, in press) and in particular paralinguistic cues, such as tone of voice, hesitations and other nuances that jurors rely on when evaluating admissible evidence entered in a trial. These are issues that have been explored with regard to trials where the defendant, witness or accused do not understand or use the language of the court and an interpreter is required (see for example Berk-Seligson, 1990; Brennan & Brown, 1997; Hale, 2004/2010, 2014; Russell, 2002). However, the effect of interpreters in the deliberation room has never been studied (Napier, 2013; Napier & McEwin, 2015).

The research on interpreters in trials has clearly shown that the competence and specialist training of the interpreter has a direct impact on the success of the interpreted interaction. The higher the level of training the interpreter has received, including specialist legal interpreting training, the higher the level of accuracy they will achieve in their interpretation (Brennan & Brown, 1997; Goodman-Delahunty et al, 2015; Liu & Hale, forthcoming; Russell, 2002; Witter-Merithew & Nicodemus, 2010), regardless of whether they are spoken or signed language interpreters. The higher the level of accuracy of interpreting, which includes accuracy of content and manner of delivery, the lower the impact on jurors' evaluations of the defendant will be (Berk-Seligson, 1990/2000; Hale, 2004/2010). Hale's (2004/2010) research, for example, showed that when Spanish interpreters rendered the content and the manner of delivery accurately into the target language, there were no significant differences in the evaluations of credibility, competence and intelligence of the witness by the juror. However, when the content was interpreted accurately but the manner was changed (for example from a powerless delivery to a powerful delivery or vice versa), the jurors' evaluations differed significantly. The effect of the mode of interpreting on juror perceptions has also shown that simultaneous interpreting produces no significant differences as compared with a monolingual situation (Hale et al, 2017). This is particularly relevant for Auslan interpreters, as their interpreting is for the most part, done in the simultaneous mode.

The focus of the above cited research has been on interpreting in open court, either for witnesses or for the defendant. Such research can be applied to our current study in a number of ways: it has shown that trained interpreters can achieve optimum levels of interpreting accuracy and that simultaneous interpreting can be less intrusive than consecutive interpreting. However, the previous research has limitations in terms of

addressing the objections that have commonly been raised to the full participation of deaf citizens on juries in Australia.

One of the key concerns is the expressed anxiety that the interpreter might become an active participant in deliberations, or that the presence of additional people will, in some way affect the dynamics of deliberations in a negative way (Napier, 2013). That is, it might interfere with, or fail to enable, the free and full discussion by all members of the jury in deliberations. This may be because the deaf juror is not able to follow and participate fully, or it may be because the other jurors feel inhibited in some way by the presence of the interpreters and/or the need to communicate via the interpreters.

In particular, the most significant objections to the participation of a deaf juror have centred around the implications for jury deliberations, which none of the research to date has been able to address directly. Correspondingly, while interpreting in open court is challenging, it is nonetheless likely to be occurring in a more controlled environment, where the judge or counsel can ask for clarification, can instruct the jury or can dismiss the interpreter if inadequate. Such controls are not available in the deliberation room, except through the leadership of the Chair.

### *1.3.1 Jury deliberations, interpreting and interaction*

Jury deliberations are dynamic, interactive discussions, where jurors engage in emotive debate and **decision-making** about the evidence presented in a trial and the potential guilt of the accused. Jury deliberations and decisions can be affected by emotional and gender dynamics (Hickerson & Gastil, 2008; Marder, 1987; Thompson & Hoggett, 2001), jury size (Kerr & MacCoun, 1985), normative pressures (Tanford & Penrod, 1986), and racial composition of juries and trial participants (Sommers, 2006). Observations of mock jury deliberations have noted that discussion involves free-association and is not logical (Winship, 2000), and that it is difficult to guarantee the quality of deliberations (Devine et al, 2007). The key to achieving effective jury deliberations (and conflict management) is interaction (Poole & Dobosh, 2010).

A range of spoken and signed language research has established that interpreters are adept at mediating interactions between two people, coordinating participation and managing **turn-taking** and overlaps (e.g. Aranguri, Davidson & Ramirez, 2006; Cirillo, 2012; Gavioli & Baraldi, 2012; Marks, 2012; Metzger, 1999; Roy, 2000; Sanheim, 2003; Wadensjö, 1998). They have found that this is also possible in multi-party encounters where there are more than two people communicating through the interpreter (which means there are typically more interruptions, overlaps and faster **turn-taking**) (Amato, 2007; Takimoto & Koshiba, 2009; Takimoto, 2012), although it is more challenging for the interpreters. Van Herreweghe (2002) found that deaf people were able to actively participate in a multi-party meeting through interpreters.

Essentially, interpreters take an active role in facilitating communication, but only so far as to ensure that interlocutors understand each other, and not to interject any opinion into the discussion. They can manage interaction without necessarily impeding it or having any negative impact on it, and the level of their interactional management depends on the professional context where they are working. For example, in court settings interpreters have less of an interactional management role than in medical appointments (Gavioli & Baraldi, 2011).

Although they have a role in communication management (see Hale, Goodman-Delahunty & Martschuk, in press; Llewellyn-Jones & Lee, 2013), professional interpreters in Australia are guided by the AUSIT and/or ASLIA Code of Ethics<sup>5</sup> in relation to their professional and ethical conduct. The main requirements of the Code are that professional interpreters interpret everything accurately, that they remain impartial and that they do not divulge any information learned during the course of their work. These professional ethical obligations are particularly important in the courtroom (Hale, 2008; Mikkelsen, 2008) and address some of the concerns expressed about allowing interpreters into the deliberation room. Professional interpreters work in many different settings where highly confidential information is discussed, and they are trusted by all parties to maintain professional secrecy. Similarly, professional interpreters know that it is not within their role to offer opinions or to help those they are interpreting for in any way whatsoever. Courts should, therefore, ensure that only professional and competent interpreters who are members of the relevant professional association and abide by a professional code of conduct, are hired to interpret in court.

Thus, to date, there is evidence that interpreters can facilitate multi-party interactions, that deaf people can participate in multi-party interactions, and that professional interpreters are impartial and maintain confidentiality. One deaf juror who had experience in both the USA and New Zealand reported that he felt that the jury deliberations benefited from having him involved with sign language interpreters, as this led to more controlled discussions (Napier, 2013). This can be considered as a form of ‘Deaf Gain’ where the presence of deaf people in the world contributes to the greater good of humanity, and can also provide tangible benefits to everyday life experiences (Bauman & Murray, 2009). But there is no actual *evidence* of how interpreters *manage* multi-party interactions in a jury deliberation, the extent to which a deaf juror can participate in the discussion or whether the presence of sign language interpreters in the deliberation room has any negative impact on the interaction.

#### ***1.4 The participation of deaf citizens in the trial process: previous research***

Previous research in Australia, directly concerned with the participation of deaf citizens on the jury, has focused on assessing the comprehension of deaf jurors in comparison to their hearing counterparts. This research arose in the context of the New South Wales Law Reform Commission’s inquiry into the participation of deaf and blind citizens on juries. The research focused on the translatability of legal concepts into Auslan, and assessing the comprehension of key terms and components of a trial (Napier, Spencer & Sabolcec, 2007; Napier & Spencer, 2008). Using a mock jury, and looking at both their understanding of key legal concepts explained in the mock trial materials (in this case the legal elements that support a conviction for manslaughter), as well as comprehension of a set of jury directions, the initial research and a follow-up study compared the comprehension of the deaf jurors with a control group of hearing jurors (Napier & Spencer, 2007, 2008, 2017).

This previous research indicated that while not all aspects of the trial, including the directions, were fully comprehended by the deaf participants, there were no meaningful *differences* between the hearing and deaf participants in terms of levels of comprehension. The findings of this research are consistent with research into juror comprehension more broadly. That is to say, most research reveals variable, and partial, comprehension of critical aspects of the trial process (see for example,



Charrow & Charrow, 1979a, 1979b; Dumas, 2000; Findlay, 2001, 2008; Luginbuhl, 1992; Smith & Haney, 2011).

So, while some objections that have been raised about the participation of jurors who are deaf (or otherwise not able to follow a trial in English without an interpreter) centre around the question of comprehension, and a concern that details or information will not be able to be translated or interpreted correctly, this concern needs to be situated within our understandings of juror comprehension more broadly.

## **2. The study**

Because juries deliberate in secret, until this study there was no empirical evidence about jury behaviour in a deliberation room when a deaf juror and sign language interpreters are present. MacCoun (1990) asserts that mock jury experiments are an effective way to examine causal influences on jury behaviour and develop theoretical models of the jury deliberation process. Although there have been some criticisms of the use of mock juries as a research methodology, it remains one of the most common methods used among experimental psychologists (Devine, 2012). Bornstein (2017) describes the many advantages of using simulation research, including the ability to analyse both the processes and the outcomes of jury **decision-making**. Furthermore, Hale and Napier (2013) assert that, wherever possible, triangulation of methodologies should be used to examine professional interpreting research questions from different perspectives and to corroborate findings. Therefore, this study comprised four stages:

1. Observations of court cases with deaf jurors in the USA and interviews with USA court officials;
2. A mock trial followed by juror deliberations with a deaf juror and sign language interpreters;
3. Interviews and focus groups with all the participants: lawyers, judge, witnesses, hearing and deaf jurors and interpreters about their experience; and
4. Focus groups with key stakeholders to explore perceptions and potential road blocks.

This paper will report on results arising from stages 2 and 3 of the study: with a focus on the deliberations and the focus group discussion held with the jurors immediately afterwards.

### **2.1 The Mock trial**

The mock trial was a re-enactment of a real case that had already been tried in the NSW District Court. The offence was related to possession and supply of illegal drugs, including statements and documentary exhibits. The trial took place in the Western Sydney Trial Court in Parramatta, NSW, and the deliberation was held in the deliberation room next to the courtroom, which is routinely used by jurors in real trials. The participants included professional experienced legal personnel comprising a: Crown Prosecutor; Defence Solicitor Advocate and instructing solicitors from Legal Aid NSW; recently retired District Court judge; serving NSW District Court Officer; and, two serving NSW Police Officers who acted as informants. Two of the

lawyers had appeared in the real case. They were primarily responsible for preparing the mock script, adapting it to a shorter duration of one and a half days, and ensuring that all personal details were changed to ensure anonymity. The defence witnesses were played by professional actors in the roles of the accused and his mother. The jury were randomly recruited from jury eligible citizens in NSW through a professional recruitment company. Two deaf jurors were randomly recruited with the assistance of Deaf Australia, to be present for the duration of the trial. At the end of the trial ballots were cast to choose one of the deaf jurors to enter the deliberation room. Two professional interpreters worked as a team throughout the trial and deliberations. They took 20-minute turns and monitored each other throughout their whole interpretations. The interpreters were trained and NAATI<sup>6</sup> accredited; one had many years of experience in the legal setting and the other was newer to working in court but had many years of general interpreting experience.

#### *2.1.1 Preparations for the mock trial*

The day before the trial, the research team and court participants met in the court to go over the logistics of the mock trial, including the position of the audio-visual recording equipment and of the interpreters. The interpreters were paid to attend on the preparation day to discuss the best position for them in the court and in the deliberation room. After some discussion and consideration, the position as shown in Figure 1, was adopted for the courtroom.

Insert Figure 1 about here

#### *2.1.2 Jury preparation*

Before the commencement of the mock trial, the jurors were given a one-page briefing note on the role of professional interpreters, and their obligations under the AUSIT Code of Ethics to interpret everything faithfully and impartially and maintain confidentiality. The briefing also outlined the protocols used in working with professional interpreters. At the commencement of the mock trial, the judge gave a direction to the jurors about the role of interpreters, their professionalism and their needs.

#### *2.2 Jury deliberations*

At the completion of the 1½ day trial, the twelve jurors (11 hearing and 1 deaf), retired to the jury deliberation room to decide on a verdict. They were given two hours to come to a verdict. The deliberation was audio and video recorded for later analysis. The interpreters were seated facing the deaf juror, as shown in Figure 2. The position of the interpreters ensured optimum view for the deaf juror to facilitate interaction with the other jurors.

Insert Figure 2 here

### **3. Results and discussion**

This part of the study aimed at answering three research questions:

1. Was the deaf juror able to participate to the same degree as the other jurors?
2. Did the interpreters become active participants in the jury deliberations?
3. Were the hearing jurors comfortable with the deaf juror and the interpreters?

The data were drawn from an analysis of the **turn-taking** during the deliberations, a focus group discussion with the hearing jurors and an interview with the deaf juror (Alex) who participated in the deliberations.

### ***3.1 Was the deaf juror able to participate to the same degree as the other jurors?***

We conducted a quantitative analysis of the number of turns taken by each juror to assess their level of participation in the room. In addition, we also measured the percentage of the time taken by each participant.

Insert Figure 3 here

As Figure 3 shows, when we look at juror participation by counting the number of turns taken by each juror, we can see that the deaf juror was in the top 5 with 99 turns, only after the Chair (with 225 turns), Juror 11 (with 126 turns), Juror 2 (with 125 turns) and the one dissenting Juror (with 123 turns). As expected, the Chair, who needs to offer directives and control the flow of turns, took the highest number of turns, and the interpreters were last on the chart, with only one turn.

The interpreter's sole intervention was not as a juror to offer any opinion on the case (see Example 1). It was simply a turn to ensure adequate protocols were followed to allow them to perform their job.

#### **Example 1: Turn 34**

Interpreter 2:           Excuse me, foreperson, can I just get you to just get one person to speak at a time?

Chair:                    Yes, yes, sure, sorry. Sorry, continue.

Due to the fact that interpreters were involved, the Chair was instructed to ensure that no overlapping speech took place, and that each person waited to be given permission to speak by the Chair. Despite these instructions, at turn 34, there was some overlapping speech (Example 1). This led to one of the interpreters taking a turn (as seen in Figure 3) to remind the Chair that they needed to speak one at a time, as interpreters cannot interpret overlapping speech. The next instance of overlapping speech occurred at turn 129, as seen in Example 2:

#### **Example 2: Turns 129-136**

Male 1:                Oh okay]

Female 4:            [I think he was using some for himself as well. I think that was said earlier.

Male 1:                [Yeah, that sort of sat in the back of my mind.

Chair: Okay, we need to—we need to have ...  
 Female 4: [Sorry.  
 Chair: ... just one person talk at a time ...  
 Male 1: Sure.  
 Chair: ... for Alex's sake.

From that time on, there was no more overlapping speech. The Chair did not have to allocate turns by giving overt permission to each speaker; instead all the jurors became accustomed to the protocol and followed it until the end. It can be argued that disallowing overlapping speech for the benefit of the interpreters can be detrimental to the free flow of communication between the jurors and interfere with the dynamics of the group. It can also be argued, on the other hand, that such ordered protocols can be beneficial to all jurors and to the outcome of the deliberations, such as in court to ensure an accurate record of proceedings. When overlapping speech is allowed, only the loudest and more assertive jurors are likely to be the ones who speak or are heard. The pace of the deliberations is also much quicker, which can lead to jurors not fully understanding or having enough time to assimilate what is being said by the other jurors. This study showed that the hearing jurors did not resent being reminded that they needed to wait their turn “for Alex’s sake” (Example 2), and it took them a very short time to accommodate the needs of the deaf juror and of the interpreters.

Alex, the deaf juror, on the other hand, expressed some frustration with the turn taking. As he states in Citation 1 below, in order to participate he needed to put more effort into it, by either putting his hand up or using his voice to interject. He seems to resent the fact that hearing jurors were able to “speak up and talk all over one another”.

Citation 1: Alex – “They let me participate although every time I wanted to say something I needed to raise my hand. I guess that is cultural. Everyone else can speak up and talk over one another, whereas I needed to raise my hand so that they knew I wanted to say something. I had to be assertive in that sense. I started to use my voice to interject, to get their attention, which helped with turn taking”.

However, in spite of this statement, the data show that Alex at times also interrupted through the interpreters, as can be seen in Example 3:

#### Example 3: Turn 79

Male 3: But detective evidence ...  
 Deaf juror (through Interpreter): [But detective evidence said on average 0.5 to 0.4 per cent? Sorry, five to 40 per cent ...

To further analyse the level of participation of the deaf juror, we quantified the amount of time each juror took when all their turns were combined. Under this analysis, we found that the deaf juror was only second to the dissenting juror, taking 12.32% of the deliberation time (see Figure 4). It must be noted that the interpreting was conducted in the simultaneous mode; therefore no extra time was needed to wait for the interpretation. Similarly, the interpreters did not need to seek clarification or repetitions at any time. Their only intervention was noted above.

Insert Figure 4 here

When Alex got his turn to speak, he took considerably longer than most of the others and explained his position in detail, as can be seen in Example 4:

Example 4: Turns 232-235

Female 4:       Yep, and also with the money that his mother gave him, the \$20,000, we don't know how much extra money that she's holding for him either. Anyway, that's ...

Deaf juror (through interpreter):       [Well I'm sure that I agree with you, I think that there are some areas that we're not sure why the police didn't look into it or why they didn't search in the house, but it could have been done. We don't know what they did find there and what happened in that situation. But if we go back to the point about the actual cash, the defence made, for me, a valid point that for a retail, say if you were to buy supplies, perhaps drugs, have these things, it's always good to have different denominations. People always have different denominations in any sort of retail situation and I agree with that in principle. So how does the cash actually demonstrate that—how is that an example of people purchasing from him? Because it doesn't actually fit with what, in my mind what works in terms of—if you go to that party or you go clubbing, people will have—they're not going to have 50s and 100s necessarily.

Female 4:       Mmm, no.

Deaf juror (through interpreter):       But what the detective—sorry, what Detective Evans had said, the value was sort of \$40 to \$70 and then 100 to 250 or whatever it might be, so it just doesn't like ...

Our quantitative results indicate that the deaf juror was able to fully participate in the deliberations through signed language interpreters as much as the hearing jurors—and in this particular case—Alex's participation was greater than many of the hearing jurors. The quantitative results are supported by the comments offered by the hearing jurors and by Alex himself. In a focus group with the hearing jurors conducted immediately after their deliberation, the researchers asked questions relating to the overall research aims.

In discussing the deaf juror's ability to participate, Juror 1 stated:

Citation 2 – juror 1: “I thought Alex had greater attention to detail probably than most of us”. [General agreement]

To which juror 4 responded:

Citation 3 – juror 4: “It was Alex who picked up the wrong information ...”.

The comments above make reference to an instance where there was an inconsistency with one of the dates, due to the changes that needed to be made in order to anonymise the details of the case. The only juror who picked up on this inconsistency was the deaf juror, which led to a question being sent to the judge for clarification.

The competence of the interpreters was no doubt a major contributor to the deaf juror's full participation. We stress that only qualified interpreters should be engaged to interpret for jurors. The hearing jurors commented on how well the interpreters must have interpreted and how impressed they were that the deaf jurors were able to understand as much as they did, when the information was solely received through the interpretation.

Juror 1 stated:

Citation 4 – juror 1: "... when it came to the discussions, it was obvious that the information that the deaf jurors had was the same as the information that we'd had. They were asking the same questions and putting forward the same points and so it seemed very clear that they were getting a good view of the information, as good a view of the information as we seemed to".

The above was supported by Juror 7, who stated:

Citation 5 – juror 7: "In the end I think, for me, when we came to deliberate, Alex was so specific of what he heard, but he didn't hear anything. It was what was interpreted to him. So everything that had got interpreted was spot on".

The deaf juror stated in the interview that he thought he was advantaged, rather than disadvantaged, because he was deaf:

Citation 6 – deaf juror: "I actually think I was advantaged because I was the only deaf person there. They seemed to listen to me more. I mean I had a lot to say. I wanted to comment and I was encouraged to do so. For me it was good. Maybe because the interpreters were there I tended to dominate".

### ***3.2 Did the interpreters become active participants in the jury deliberations?***

One of the concerns about allowing interpreters in the deliberation room was that they would take on an active role and become extra 'pseudo' jurors. The quantification of the turns proved this fear to be unfounded, with only one turn taken by one of the interpreters to assert the agreed protocol. The jurors' comments also indicate that the interpreters were only active in fulfilling their role as interpreters, but not as extra jurors. They interpreted everything that was spoken to the deaf juror and everything that was signed to the hearing jurors. They did not participate in any other way. When the interpreters were asked by the jurors to comment on what they thought of the case during one of the breaks, Juror 1 commented:

Citation 7 – juror 1: "Yeah, I think it was good for them just to say—and they didn't say it in a rude way—they just said, we have a code of ethics, we can't really answer that".

The above was supported by jurors 2 and 6 who stated:

Citation 8 – juror 2: “They didn't get involved at all, themselves”.

Citation 9 – juror 6: “I wouldn't even know what their point of view was about the case. I don't think they stepped over that boundary or anything”.

Alex, however, found the interpreters' obligations to their code of ethics to be a challenge:

Citation 10 – deaf juror: “It's very hard for me, how do I say this, to not engage in any 'water cooler' talk with the interpreters. I had to stave off the temptation to do that. I was very conscious of that and it was a real challenge”.

The fact that interpreters need to have regular breaks means that the deaf juror is left in isolation during the breaks, unable to communicate with the rest of the jurors. This is one real obstacle that may be impossible to overcome, unless a third interpreter is hired for the breaks.

Trusting the interpreters' competence is crucial for all involved in the interpreted interaction. As we saw from the hearing jurors' comments, they fully trusted the interpreters' accuracy. Alex, the deaf juror, was also asked about his impressions of the interpreters and whether he trusted them. In response he stated:

Citation 11 – deaf juror: “I think for me, what made me trust them was right at the start of proceedings when the judge asked them to take an affirmation/oath. They took an affirmation and that gave me confidence that they were committed to their work. That act showed me that they were willing to take on the role and deliver”.

He also stressed the importance of the interpreters' level of competence (see Citation 11), which is a fact that needs to be stressed when referring to any interpreting situation.

Citation 12 – deaf juror: “It's important to consider their skill, qualification, experience and the ability to deliver that consistently, and that interpretations are delivered as accurately as possible”.

There is very little doubt that interpreters who are unqualified and do not abide by a strict code of ethics would not have performed to the required level in such a situation.

### ***3.3 Were the hearing jurors comfortable with the deaf juror and the interpreters?***

The last research question addressed the concern about the way the deaf juror and the interpreters might impact the other jurors' level of comfort. During the focus group discussion, the hearing jurors agreed that after a short while, everyone learned the protocols, became accustomed to working with the interpreters and almost forgot that

they were there, a fact that is borne out in our turn taking analysis. This sentiment is illustrated in the comment by Juror 1:

Citation 13 – juror 1: “Yeah, I agree with [another juror]. I was surprised, it was just so easy and even after just one day, you're so comfortable with the people and the interpreters that you start looking at the people rather than the interpreters and I was surprised how well it worked and how easy it was ... It was so natural”.

The above indicates that competent, professional and ethical interpreters do not disrupt the flow or interfere with the dynamics of the deliberation room in any significant way, contrary to what many had believed at the outset, as expressed by Juror 1 below:

Citation 14 – juror 1: “Yeah, I thought it might be distracting ... Yeah, just the placement of them near the witness and things like that. But it turns out it wasn't an issue at all”.

On the same point, Alex commented that:

Citation 15 – “By the time we got to the deliberation room they were used to it”.

#### **4. Conclusion**

Citation 16 – deaf juror: “I know it was a mock trial but I got a taste of what it would be like. It was a good and interesting experience ... I think everyone on the jury learned something new and profound, and that is that it is nice to have diversity in the judicial system ... there were eleven jurors who will go away with a different and positive perspective about deaf people. That's positive”.

As Alex stated in Citation 16, there were many positive results that arose from this study. The preliminary results from the project provide evidence that there was little impact on jury deliberations because of the inclusion of a deaf juror. The quantitative data proves that the deaf juror was able to fully participate in discussions in the jury room and in fact was more communicative than seven of the eleven jurors. The qualitative data, largely from observations made by hearing jurors and the deaf juror himself, indicate that the deaf juror had an excellent grasp of the evidence of the case and displayed a high level of accuracy regarding the factual matrix based on the evidence presented to the jury in the courtroom proceedings. In fact, it could be argued that there was evidence of ‘Deaf Gain’ (Bauman & Murray, 2009) in that having a deaf person present with highly competent interpreters was commented on positively and potentially enriched the deliberation process.

The results allow the research team to answer the first research question in the affirmative, that is, the evidence shows that the deaf juror was able to participate in jury deliberations to the same degree as hearing jurors. The added significance of this result is that it addresses continuing negative preconceptions and misconceptions about the ability of deaf people to act as jurors and of Auslan interpreters to fully and



accurately interpret everything so that the deaf juror can communicate effectively with hearing jurors. This is consistent with previous research, but does underline that it is essential to recognise that highly competent *professional and ethical* interpreters were able to effectively remove the communication barrier. However, incompetent interpreting will most likely have the opposite effect. It is therefore crucial in these circumstances, as in all legal interpreting, that only highly trained professionals be hired as interpreters to facilitate communication when a deaf juror is involved.

The data also addresses the second research question as to whether Auslan interpreters become active participants in the deliberations of juries thereby becoming *de facto* 13<sup>th</sup> and 14<sup>th</sup> jurors. The qualitative data affirms the professional approach of Auslan interpreters in not participating in the substantive discussions of juries outside of their role as interpreting the deliberations. Hearing jurors were unanimous in observing that interpreters did not allow their own opinions to impact on the substance of the interpretation. The fact that hearing jurors did not know the opinion of the interpreters regarding the guilt or innocence of the accused and that after a short while they spoke directly to the deaf juror and not the interpreter when communicating is evidence of the ethical role played by the Auslan interpreters.

This result allows the research team to answer the second research question in the negative. That is, it was clear that the interpreters were not active participants in the jury deliberations, and importantly, that they were able to draw on professional accountabilities and established communication ground rules to ensure that in the event that a juror attempted to draw an interpreter into the conversation this could be quickly closed down.

Finally, in relation to the third question, the results indicated that the hearing jurors were comfortable with the presence of the interpreters in the room, and quickly became accustomed to mediated communication with the deaf juror.

At the time of writing this article, analysis is being conducted on the post mock trial interviews and the stakeholder focus groups transcripts that will be reported in a subsequent paper by the authors. There remain some issues relating in particular to ensuring fair trial obligations, as well as resourcing implications within an increasingly stretched criminal justice system. Notwithstanding this, the preliminary results from the research are positive and show that in reality there is minimal impact on the jury deliberation process by having one or more deaf people serve on a jury with professional interpreters. The concerns raised by the various state governments about the appropriateness and potential negative impact of having deaf people and their interpreters present in the court and jury rooms appears to be unsupported by the evidence.

The results from this study have the capacity to inform progressive decisions regarding changes in state, territory and federal legislation and conventions so as to enable deaf people to serve as jurors using the services of qualified and accredited Auslan interpreters (see further discussion in Spencer et al., 2017). Where appropriate, it may be necessary for state, territory and federal governments to modify courtrooms in terms of layout for better positioning of interpreters to allow deaf people to serve as jurors. We acknowledge that such changes will inevitably have budget implications. Nevertheless, the results in this study are consistent with the recommendations made in the NSW Law Reform Commission Report in 2006. They

offer further evidence to support policy and legislative changes to bring Australia's jury selection processes in line with its international obligations, ensuring equality among deaf and hearing citizens.

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<sup>1</sup> Australian Sign Language.

<sup>2</sup> UNSW Ethics Clearance reference #HC14049. This includes permission to not anonymise the location of the study as NSW District Court, Parramatta.

<sup>3</sup> See Committee on the Rights of Persons with Disabilities, Views: Communication No. 11/2013, UN Doc CRPD/C/15/11/2013 (25 April 2016) 2.1-2.7 and Committee on the Rights of Persons with Disabilities, Views: Communication No. 13/2013, UN Doc CRPD/C/15/13/2013 (25 April 2016).

<sup>4</sup> *Lyons v State of Queensland* [2014] QCATA 302 (21 October 2014) at [30]-[31].

<sup>5</sup> AUSIT is the Australian Institution for Interpreters and Translators. ASLIA is the Australian Sign Language Interpreters' Association.

<sup>6</sup> NAATI stands for the National Accreditation Authority for Translators and Interpreters.

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